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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 420

RICHMOND TELEVISION CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1952 petitioner was organized and submitted an application to the Federal Communications Commission for a construction permit and license to operate a television station in Richmond, Virginia. In anticipation of favorable action on its application petitioner, during 1953 through 1955, expended $53,129 to train and acquire a television staff. Petitioner's applications were subsequently granted and it began broadcasting in 1956. Petitioner seeks to deduct these

pre-operation training expenditures in the years in which they were incurred (*i.e.*, on its 1953 through 1955 tax returns). This would create net losses for those years (since petitioner had no income during 1953-1955), which petitioner seeks to carry forward against its 1956 and 1957 income from broadcasting operations. By amendment to its complaint, petitioner argued alternatively that if its 1953-1955 expenditures are to be capitalized, it should be entitled to amortize them over the term of the initial FCC license. The jury found for petitioner on both grounds; the court of appeals held that there was no evidence on which the case could have been submitted to the jury and accordingly reversed. (Pet. App. 1-5.)

1. Petitioner's expenditure of approximately $53,000 to train personnel before it began operations or received an FCC license is a classic example of a nondeductible capital expenditure—*i.e.*, an expenditure that was designed to and did contribute to the production of income in future years. See *KWTX Broadcasting Co.* v. *Commissioner*, 31 T.C. 952, affirmed *per curiam*, 272 F. 2d 406 (C.A. 5); *Radio Station WBIR, Inc.* v. *Commissioner*, 31 T.C. 803; *World Publishing Co.* v. *Commissioner*, 35 T.C. 7, reversed on other grounds, 299 F. 2d 614 (C.A. 8); *Petersburg Television Corp.* v. *Commissioner*, decided February 27, 1961 (P-H Memo T.C., par. 61,049); *WHEC, Inc.* v. *Commissioner*, 37 T.C. 821; Rev. Rul. 56-520, 1956-2 Cum. Bull. 170; Rev. Rul. 57-377, 1957-2 Cum. Bull. 146; 4 Mertens, *Law of Federal Income Taxation*, § 205.08. If petitioner were permit-

ted to deduct these expenses as incurred, its income would be grossly distorted. This is dramatically illustrated by the fact that petitioner had no income in 1953-1955, the years the costs here in question were incurred, but seeks to create a net loss to be carried over against operating income in later years. Petitioner relies upon § 162 of the Code as authorizing the instant deductions. In line with the requirement that pre-operating expenditures be capitalized, that provision allows a deduction for only those expenses "paid or incurred during the taxable year *in carrying on any trade or business*" (emphasis added). The court of appeals correctly held that petitioner did not carry on any trade or business during the years 1953 to 1955 and that its costs here in question were thus nondeductible capital expenditures. (Pet. App. 5-12.)

2. By amendment to its complaint, petitioner claimed in the alternative that if the amount in question was a nondeductible capital outlay it had a useful life co-extensive with the term of the FCC construction permit and the first regular broadcasting license. Petitioner accordingly claimed the right to amortize the expenditures over this period of 58 months (Pet. App. 12-15). In order to qualify for amortization petitioner had to prove "from experience or other factors" that the useful life of a broadcast license was "a limited period, the length of which can be estimated with reasonable accuracy." Treas. Regs. § 1.167(a)-3. The testimony at trial showed that the FCC had never failed to renew a television license and

that comparable radio licensing experience showed a failure to renew in less than one-tenth of one percent of the cases (R. 105, 125-126).[1] Nevertheless, petitioner rested its case solely on the fact that such licenses were subject to renewal every three years. The court of appeals recognized that other courts had found that despite the FCC's power to refuse to renew a TV license, there was no substantial likelihood that any particular taxpayer's license would be denied (Pet. App. 12-14). In practice such licenses have virtually an unlimited life. Thus, the appellate courts have uniformly refused to permit taxpayers to amortize such costs and expenses in similar cases. See *KWTX Broadcasting Co.* v. *Commissioner*, 31 T.C. 952, affirmed *per curiam*, 272 F. 2d 406 (C.A. 5); *Commissioner* v. *Indiana Broadcasting Corp.*, decided August 17, 1965 (C.A. 7); *Westinghouse Broadcasting Co.* v. *Commissioner*, 309 F. 2d 279 (C.A. 3); Rev. Rul. 56-520, 1956-2 Cum. Bull. 170; Rev. Rul. 57-377, 1957-2 Cum. Bull 146; see also *Nachman* v. *Commissioner*, 191 F. 2d 934 (C.A. 5); *Gant* v. *Commissioner*, 263 F. 2d 558 (C.A. 6).

However, the court of appeals did not find it necessary to pass on this issue, since it concluded that petitioner's amortization claim was not presented in the years before it (Pet. App. 14-15). In this respect the court may have been misled by petitioner's amended complaint which failed to identify the years or amounts of the claimed amortization deductions and

[1] "R." references are to Appendix B of the government's brief before the court of appeals.

concluded with a prayer for judgment in an amount suggesting that the full $53,129 had been completely amortized (R. 9-10). In a petition for rehearing petitioner argued, *inter alia*, that it had in fact begun business during the taxable years here in question and was thus entitled to have its amortization argument considered on the merits (Pet. App. 17-18). The petition was denied, however, on the ground that the issue had not been properly presented to the court in the first instance (Pet. App. 19).

Even assuming that the lower court erred in disposing of petitioner's amortization claim on procedural grounds, the instant case would not merit review by this Court. It is perfectly obvious that the record contains no evidence whatsoever regarding "experience or other factors" from which any court could have determined that petitioner's broadcasting business may be expected to terminate after 58 months or any other "limited period." It is therefore quite clear that petitioner is not entitled to amortize the costs of training its staff over that period. See cases cited, *supra*, p. 4. Accordingly, the result reached by the court below was correct and its error, if any, was harmless.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

RALPH A. MUOIO,
FRED R. BECKER,
Attorneys.

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